90-1251

NO. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

VS.

CARL FRANZ OGBORNE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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QUESTION PRESENTED FOR REVIEW

Whether the Superior Court of Pennsylvania misapprehended the holding of the United States Supreme Court in Terry v. Ohio in holding the Fourth Amendment to the United States Constitution required suppression of evidence seized in a warrantless investigatory stop of a motor vehicle as it arrived on the driveway of the operator's residence, where police officers received a telephone tip hours earlier from a confidential, reliable informant, who claimed personal knowledge, that the operator would be leaving Philadelphia and arriving at his residence in an adjacent county carrying ten bundles of PCP in a described motor vehicle.

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OCTOBER TERM 1990
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COMMONWEALTH OF PENNSYLVANIA,
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VS.

CARL FRANZ OGBORNE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Petitioner, the Commonwealth of Pennsylvania, respectfully requests that a Writ of Certiorari issue to the Supreme Court of Pennsylvania to review the Judgment and Opinion of the Superior Court of Pennsylvania entered in this case.

OPINIONS BELOW

The Opinion and Judgment of the Pennsylvania Superior Court, which is officially reported at 384 Pa.Super. 604, 559 A.2d 931, (1989), is set forth in full in Appendix A of this Petition. The Opinion of the Court of Common Pleas of Delaware County, Pennsylvania, not reported, is set forth in full in Appendix B of this Petition.

STATEMENT OF JURISDICTION

(i) The judgment of the Pennsylvania Superior Court sought to be reviewed, was entered May 1, 1989. Application for Reargument was denied July 10, 1989.

(ii) The Pennsylvania Supreme Court granted the Commonwealth's Petition for Allowance of Appeal from the Superior Court judgment on March 14, 1990. (Appeal Docket 1990 Eastern District of Pennsylvania No. 28). This matter was briefed and orally

argued before the high court December 3, 1990. On January 7, 1991, the following order was entered:

> On consideration whereof, it is now here ordered and adjudged by this Court that the appeal having been improvidently granted, the same is hereby dismissed.

The order of the Pennsylvania Supreme Court entered January 7, 1991 is set forth in Appendix C of this Petition.

(iii) The jurisdiction of this Court is invoked pursuant to the United States Code 28 U.S.C. 1257(3). The decision of the Superior Court was based on Federal grounds. Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983).

U.S. CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment Four, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

CONCISE STATEMENT OF THE CASE

Suppression of Evidence

In the early evening hours of January 15, 1987,[1] a Delaware County, Pennsylvania Criminal Investigation Detective, with seven years experience, received telephone information from a confidential informant, who had given reliable information in the past, which resulted in the arrest and conviction of drug violators within the past year, who stated, of his personal knowledge, that Carl Ogborne would be returning from the City of Philadelphia within the next couple of hours, operating a brand new black Dodge Daytona motor vehicle, to his home situated on the rear of the lot at the end of a long driveway in the middle of the 100 block of Saude Avenue, in Essington, Delaware County, (adjacent to Philadelphia County), and would have in his possession ten (10) bundles of PCP or angel dust, phencyclidine. Carl Ogborne was known to

the detective from prior contacts as being involved with distribution of PCP. The detective drove to the site and confirmed the location of the house at the end of a long driveway as 115 Saude Avenue, that Carl and Karen Ogborne both resided there, and that a brand new black Dodge Daytona vehicle was often seen parked there. The detective, accompanied by another detective, both operating unmarked cars, set up surveillance at either end of the street at 11:00 p.m. A local marked police car stood by for back-up. At 11:20 p.m., a brand new black Dodge Daytona sedan was observed turning onto the street, and then turning into the long driveway in the middle of the block. The detective recognized the operator. Both detectives followed behind him with dashboard revolving lights on, followed by the marked police vehicle.

The detective approached the driver's side of the vehicle, tapped on the window,

displayed his badge, and announced "Police officer, please shut the car off", without response. After again repeating the request, without response, he opened the car door, repeated the request a third time, and the operator complied. He then detected the odor of PCP. The detective then directed Ogborne to step out of the vehicle for safety reasons and so that he could talk to him. Subsequently, after a pat down for weapons, PCP was found on his person.[2]

Issue Raised

Defendant raised the issue of the legality of the stop of the motor vehicle in the driveway of his residence under the Constitution of Pennsylvania and the Constitution of the United States, and after hearing, the trial court held that there was sufficient reasonable suspicion, based on the information the police officer had received from the reliable informant, plus the police officer's corroboration, to make

an investigative stop,[3] and denied the motion to suppress evidence.

On April 3, 1987, Ogborne was tried by the court, without a jury, and adjudged guilty of knowing or intentional possession of a controlled substance with intent to deliver.

On May 13, 1988, defendant was sentenced to a term of imprisonment of two and one-half to five years.

On appeal to the Pennsylvania Superior Court, the judgment of sentence was reversed. The Superior Court found police violation of the Fourth Amendment of the United States Constitution in making the investigatory stop. The Petition for Allowance of Appeal was granted by the Pennsylvania Supreme Court, and after brief and argument, the Supreme Court held appeal was improvidently granted. (Appendix C).

A copy of respondent's pre-trial Petition to Suppress Evidence, and Motion

for New Trial, raising the constitutionality issues under state and federal law, are attached as Appendix D and E.

REASON FOR GRANTI

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investigatory stop of his vehicle", applying the analysis of Terry v. Ohio, supra, and Commonwealth v. Higgins, 346 Pa.Super. 238, 499 A.2d 585 (1985), quoting Terry v. Ohio, U.S. Cert. denied 107 S.Ct. 149.

The Superior Court held where information known to the police is based on an informant's unverified tip, given of his own personal knowledge, as to anticipated violation of law, that a motor vehicle, operated by known drug dealer, would arrive at occupant's house with contraband within a couple of hours, there is nevertheless a Fourth Amendment warrant requirement, (absent exigent circumstances, which concededly did not exist here), before police can detain a suspect for investigation purposes, where police did not corroborate criminal facts, did not personally observe crime in progress, time interval was sufficient to go to

magistrate's office for a warrant, and stop was at destination point on private driveway outside suspect's residence.

Warrant Requirement

The Superior Court held that before making an investigatory stop in such a situation a warrant must be obtained if there is sufficient time between the tip and the stop within which police could obtain the same, even given police belief they have insufficient probable cause to arrest or search.

Holding that where five hours,[5] elapses from the time police received an informant's tip that a criminal suspect will be carrying drugs, and the suspect's actual arrival, police must seek a search warrant.[6] The Superior Court states, (Appendix A, p. 6):

> "Doubtless, enough time existed between the receipt of the confidential information and the stop for Detective Greenwalt to apply for a search warrant. However, in that time span no efforts were made by police to secure a search warrant. We do not retreat from

holdings that the police, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure. Terry, 88 S.Ct. at 1879, quoting, e.g. Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). In most circumstances, failure to comply with the warrant requirement can only be excused by exigent circumstances." Terry, 88 S.Ct. at 1879, quoting, e.g., Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967).

Acknowledging the police officer lacked probable cause to obtain a warrant to search, or exigent circumstances to justify a warrantless search, which was conceded, the Court nevertheless imposed a warrant requirement, rather than a Terry analysis, to justify an investigatory stop, whenever there may appear to be adequate time to obtain a warrant, as follows, (Appendix A, p.7):

"In the instant situation the police, armed with the uncorroborated tip that appellant possessed P.C.P. waited approximately five (5) hours before attempting to conduct a Terry investigative stop in a private driveway. Such police conduct, in effect, circumvents the warrant procedure by using information that

does not rise to the level of probable cause to justify an investigative stop conducted literally hours after the information was received. Further it makes a mockery out of the warrant procedure and departs from the factual circumstances buttressing Terry investigative stops."

Anticipatory Stop [7]

The holding that there cannot be an anticipatory stop of defendant's car five hours later, contradicts Draper v. United States, 358 U.S. 307, 79 S.Ct. 329 (1959), (24 hours notice suspect would be arriving at Denver, Colorado by train from Chicago).

Private Driveway

At (Appendix A, p.6), the Superior Court finds:

"In essence, Detective Greenwalt stopped appellant's vehicle in his private driveway at his residence based solely on the informant's unverified allegation that appellant was carrying drugs."

Further (Appendix A, p.10), the Superior Court holds:

"However, in the absence of exigent circumstances, admittedly not present here unsupported allegations by informants that certain individuals

possess drugs which do not rise to the level of probable cause for a search warrant, may not be utilized by police five (5) hours later to justify an investigative stop on a person's private property."

The Superior Court holds that the investigatory stop of vehicle could not be made because defendant had pulled his car onto his private property, and stopped before the officers approached him, ignoring holding of this Court that where police have a legal right to stop an automobile, and it then turns into a residential driveway, they may pursue and stop it, in search for untaxed liquor. Scher v. United States, 305 U.S. 251, 255, 59 S.Ct. 174 (1938).

Informant Tip Must Be Corroborated

The Superior Court seems to reject a Terry analysis whenever suspicion of criminal activity is not obtained by police first hand finding an uncorroborated tip insufficient.[8] (Appendix A, p.8):

"Instantly, Officer Greenwalt did not personally observe any unusual conduct

to indicate criminal activity may have been afoot. We are not intimating that personal observation by the police of suspected criminal activity is a dogmatic requirement of Terry stops. However, we are of the opinion that investigative stops cannot be justified by the receipt of uncorroborated allegations by a confidential informant acted on by police five (5) hours later. In other words, the factual circumstances of the case sub judice are simply too far removed from the line of cases upholding Terry stops."

Then further (Appendix A, p.10):

"In conclusion, we hold that police may not conduct a valid investigative stop based solely on a confidential informant's isolated and uncorroborated allegation that a particular individual is in possession of drugs. We do not imply that confidential information may not buttress a police officer's foundation for an investigative stop in situations where the officer can point to specific and articulable facts."

As long ago as Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921 (1972), it was made clear that reasonable suspicion, justifying an investigatory stop, could arise from an uncorroborated informant's tip. There, a reliable informant told police that an individual seated in a vehicle possessed a

gun and narcotics. The United States Supreme Court upheld the investigatory stop, and stated 407 U.S. at 147, 92 S.Ct. at 924:

> In reaching this conclusion, we reject respondent's argument that reasonable cause for a stop and frisk can only be based on the officer's personal observation, rather than on information supplied by another person.

The United States Supreme Court recently held that an anonymous informant's unverified tip that a car containing drugs would be driving to a particular location could justify an investigatory stop of the vehicle just short of the motel destination, where only departure from building was corroborated. Alabama v. White, ___U.S.___, 110 S.Ct. 2412, 2415-17 (1990).

The Superior Court's interpretation of Terry emasculates the holdings of the United States Supreme Court as to reasonable basis for intermediate response, and encourages a police officer to "simply shrug his

shoulders" and decline to investigate a drug crime as to which a confidential, reliable informant in Philadelphia tells him is about to occur, when suspect arrives at his destination in his jurisdiction, because he could not corroborate information given that suspect was leaving a specific location in a certain vehicle carrying drugs. Had he corroborated that, he would have had probable cause. When a credible informant warns of a specific impending crime - the subtleties of the hearsay rule should not thwart an appropriate police response. Adams v. Williams, 407 U.S. at 147, 92 S.Ct. at 1924.

CONCLUSION

For all the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests that a Writ of Certiorari be issued on the Pennsylvania Supreme Court to review the decision below.

Respectfully submitted,

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FOOTNOTES

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1 The Superior Court found the time to be about 6:30 p.m., without any evidentiary basis in the record.

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2 The issue of the necessity or scope of the pat-down search was not raised.

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3 It was conceded the information did not rise to probable cause as informant did not disclose to police how he obtained his information.

The trial court was of the opinion this was a "close" question. See, Commonwealth v. Silverman, 373 Pa.Super. 274, 541 A.2d 9 (1988), where trial court suppressed search warrant as affidavit did not state the circumstances under which the informant obtained the information, and the Superior Court reversed.

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4 The Constitution forbids not all searches and seizures but unreasonable searches and seizures. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 889 (1968). Police officer may in appropriate circumstances and in appropriate manner approach person for purposes of investigating possible criminal behavior even though there is no probable cause to make arrest. Id. 392 U.S. at 22, 88 Sup.Ct. at 1880.

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5 Police were informed respondent would return from Philadelphia to his home in Essington "within the next couple of hours". There is no support in record that five hours elapsed from an early evening call and 11:20 p.m. The time of the call is not given, other than early evening, nor did informant predict the hour of arrival to police.

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6 The Superior Court overlooks the testimony that police spent time to verify the make of the car usually parked at the house and ownership of the suspect's house, consistent with informant's disclosure and that police set up surveillance at the house prior to the suspect's arrival. The suspect could have left Philadelphia earlier cutting off available time to obtain a warrant.

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7 The police response if there were probable cause would be "an anticipatory search warrant". Commonwealth v. Reviera, 387 Pa.Super. 196, 563 A.2d 1252 (1989). The search warrant would be based on affidavit of probable cause that at some future time, but not presently, certain evidence of crime will be located at a specific place.

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8 The court deems insufficient corroboration as to location of house, at the end of a long driveway, in "the middle of the block", the occupants thereof, and the description of the car.

APPENDICES

J. 87006/1988

COMMONWEALTH OF PENNSYLVANIA	:	IN THE
	:	SUPERIOR
Appellee	:	COURT OF PA
	:	
V.	:	
	:	No. 1859
CARL FRANZ OGBORNE,	:	Phila. 1988
	:	
Appellant	:	

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of DELAWARE County be, and the same is hereby REVERSED. JURISDICTION RELINQUISHED.

BY THE COURT:

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Dated: May 1, 1989

Appendix A

J. 87006/1988

COMMONWEALTH OF PENNSYLVANIA	:	IN THE
	:	SUPERIOR
Appellee	:	COURT OF PA
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V.	:	
	:	No. 1859
CARL FRANZ OGBORNE,	:	Phila. 1988
	:	
Appellant	:	

Appeal from the Judgment of Sentence of the Court of Common Pleas of Delaware County, Criminal at No. 283-87

BEFORE:CAVANAUGH, TAMILIA and POPOVICH, JJ.

OPINION BY POPOVICH, J.:

FILED MAY 1 1989

This is an appeal from the judgment of sentence of May 13, 1988.[1] Following a non-jury trial on April 3, 1987, appellant was adjudicated guilty of possession of a controlled substance and possession with intent to deliver a controlled substance.

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[1]Appellant was sentenced to imprisonment in a state correctional institution for a period of not less than two and one-half years nor more than five years for possession with intent to deliver a controlled substance. For the purposes of sentencing the charge of possession of a controlled substance merged with the charge of intent to deliver a controlled substance.

He was found not guilty of possession of drug paraphernalia.[2] For the reasons herein set forth, we reverse.

The pertinent facts are as follows: Detective Greenwalt of the Delaware County C.I.D. returned a telephone call from a confidential informant in the early evening of January 15, 1987. Over the past year the informant provided police with reliable information concerning drug activities in Delaware County. The informant told Detective Greenwalt that appellant would arrive later that evening in a black Dodge automobile at the 100 block of Saude Avenue, Tinicum Township. He further informed police that, based on personal knowledge, he knew the appellant would have in his possession approximately 10 bundles of the drug Phencyclidine (hereinafter P.C.P.). Detective Greenwalt testified that, after

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[2] The trial judge mistakenly indicates in his March 28, 1988 opinion that appellant was found guilty of possession of drug paraphernalia.

receiving the information from the confidential informant, he did not request a search warrant or arrest warrant because he did not think there was sufficient probable cause to obtain one. (N.T. Suppression Hearing 3/30/87, p. 33)

Detective Greenwalt knew appellant was involved in the distribution of P.C.P. in 1981 and 1985. He proceeded to call the Tinicum Township police and confirm that appellant and his wife resided at 115 Saude Avenue, and that a black Dodge was frequently parked in front of that property.

A police surveillance of the 100 block was set up that night. At approximately 11:20 p.m. the police observed a black Dodge enter Saude Avenue from Second Street. When the vehicle reached 115 Saude Avenue it turned into a private driveway. At this time Detective Greenwalt identified appellant as the driver of the car.

An unmarked police car operated by Detective Greenwalt immediately pulled into

the driveway behind appellant's vehicle. Detective Greenwalt then activated the emergency red flashing lights mounted on the dashboard of the vehicle. Two additional police cars parked behind Detective Greenwalt's automobile to prevent appellant from backing his vehicle onto the street.

As four or five officers surrounded appellant's car, Detective Greenwalt approached the driver's side of the black Dodge. He tapped on the car window, showed appellant his badge, and identified himself as a police officer. Detective Greenwalt testified at some point in time he reached back and rested his hand upon his service revolver, but did not draw the weapon. Detective Greenwalt repeatedly ordered appellant to shut off the engine, but appellant did not respond. After opening the driver's side door Detective Greenwalt again ordered appellant to turn off the motor. Upon detecting the odor of P.C.P., Detective Greenwalt ordered appellant to

step out of the car.

A search of the appellant outside the vehicle resulted in the discovery of approximately 89 packets of P.C.P. A smaller amount of the drug was also found inside appellant's Dodge vehicle. The discovery of this evidence bottomed all the criminal charges for which appellant was convicted.

At the suppression hearing the Commonwealth testified it was its position that there was no probable cause to search appellant or appellant's vehicle for drugs until Detective Greenwalt smelled odor of P.C.P. emanating from the Dodge. (N.T. Suppression Hearing 3/30/87 p. 23, 29)

The sole issue presented by these facts is whether the police conducted a valid investigatory stop of the appellant prior to the search and seizure of the evidence.

In evaluating an investigative stop, a court must first inquire whether the officer's action was justified at its

inception. The stop must be based on specific and articulated facts, which, taken together with rational inferences from those facts, reasonably warrant the intrusion. Next, the court must inquire whether the intrusion was reasonably related in scope to the circumstances which justified the interference in the first place. Commonwealth v. Higgins, 346 Pa.Super. 238, 499 A.2d 585 (1985), U.S. cert. denied in 107 S.Ct. 149, quoting Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 889 (1968). Traditionally, it was accepted that seizure of the person was required by the Fourth Amendment to be based on probable cause. The first recognition that the Fourth Amendment reasonableness requirement could be satisfied by a showing of something less than probable cause was announced in Terry. However, we are admonished to be mindful that the Terry principle is an exception to the general rule requiring probable cause and must not be extended in such a way as to

swallow the rule. See generally, Commonwealth v. Lovette, 498 Pa. 665, 450 A.2d 975 (1982).

In the case sub judice, the Commonwealth argues Detective Greenwalt relied on specific articulated facts which provided reasonable cause to believe drugs might be found on the appellant or in his car. Appellee notes that Detective Greenwalt was contacted by a reliable informant who provided accurate information in the past concerning local drug activities. The informant told the Detective that appellant would drive a black Dodge vehicle to a certain city block on a particular night. He further informed police that he possessed personal knowledge that appellant would be carrying approximately 10 packets of P.C.P. Detective Greenwalt had prior knowledge of appellant's drug activities. A check with local authorities confirmed the appellant's home was located in the city block described

by the informant. Based on these circumstances, the Commonwealth argues the police were entitled to stop and investigate the appellant for suspected drug use.

Appellant argues he is entitled to a new trial because the lower court erred by denying his motion to suppress the evidence obtained at the time of the arrest. He contends the police lacked the reasonable suspicion needed to justify an investigatory stop of his vehicle. We agree with the position of the appellant. Applying the aforementioned analysis of Higgins and Terry, we have no doubt Detective Greenwalt's investigatory stop was not justified at its inception.

Clearly, the pivotal piece of information in the case sub judice was informant's tip that appellant would be carrying drugs. Detective Greenwalt testified at the suppression hearing that he did not know the basis of the informant's tip, and that he did not ask the informant

to reveal how he obtained such information. In the opinion of the Detective, the information regarding possession of P.C.P. by the appellant came from the informant's personal knowledge. (N.T. Suppression Hearing, p.30)

In essence, Detective Greenwalt stopped appellant's vehicle in his private driveway at his residence based solely on the informant's unverified allegation that appellant was carrying drugs. Moreover, approximately five (5) hours elapsed since police received the informant's tip and the actual arrest was conducted.[3] Doubtless,

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[3]Detective Greenwalt testified that he returned a telephone call from the informant in the "early evening hours" of January 15, 1987. (N.T. Suppression Hearing, p. 6) He proceeds to testify that a "couple of hours" elapsed from when he received the informant's telephone call and set up surveillance at 11 p.m. of 115 Saude Avenue. (N.T. Suppression Hearing, p. 10) As such, the testimony reveals a wide discrepancy regarding the actual time the police received the informant's tips. However, according to the trial court, the tip was received "during the early evening hours of January 15, 1987." (Trial Court Opinion, March 28, 1988, p.2)

enough time existed between the receipt of the confidential information and the stop for Detective Greenwalt to apply for a search warrant. However, in that time span no efforts were made by police to secure a search warrant. We do not retreat from holdings that the police, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure. Terry, 88 S.Ct. at 1879, quoting, e.g., Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 29 576 (1967). In most circumstances failure to comply with the warrant requirement can only be excused by exigent circumstances. Terry, 88 S.Ct. at 1879, quoting, e.g., Warden V. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967).

In the case at bar Detective Greenwalt did not obtain a search warrant following the receipt of the informant's tip because he admitted the police did not have probable cause to do so. (N.T. Suppression Hearing

3/30/87 p. 20-21) Moreover, the record does not reflect that any exigent circumstances existed to justify the warrantless search. In the instant situation the police, armed with the uncorroborated tip that appellant possessed P.C.P. waited approximately five (5) hours before attempting to conduct a Terry investigative stop in a private driveway. Such police conduct, in effect, circumvents the warrant procedure by using information that does not rise to the level of probable cause to justify an investigative stop conducted literally hours after the information is received. Further, it makes a mockery out of the warrant procedure and departs from the factual circumstances buttressing Terry investigative stops.

In Terry, the police officer personally observed two men hover about a street corner for an extended period of time. The men paced alternately along an identical route, pausing to stare in the same store window

roughly 24 times. The two individuals were eventually joined by another man in one of a number of conferences held upon the completion of their route. Terry, 88 S.Ct. at 1881. In Terry the police officer personally observed each suspect go through a series of acts, each of them perhaps innocent in itself, but which, taken together, warranted further investigation. Id. Clearly, the facts of the case on hand have no resemblance to the facts in Terry which justified the police officers invasion of Terry's personal security by searching him for weapons in the course of the investigation.

Instantly, Officer Greenwalt did not personally observe any unusual conduct to indicate criminal activity may have been afoot. We are not intimating that personal observation by the police of suspected criminal activity is a dogmatic requirement of Terry stops. However, we are of the opinion that investigative stops can not be

justified by the receipt of uncorroborated allegations by a confidential informant acted on by police five (5) hours later. In other words, the factual circumstances of the case sub judice are simply too far removed from the line of cases upholding Terry stops. United States v. Hensley, 469 U.S. 221, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985) (description on "wanted flyer" issued by neighboring police department held sufficient basis for investigative stop); United States v. Harris, 421 F.Supp. 121 (E.D.Pa.1976), aff'd 565 F.2d 153 (3rd Cir. 1977), cert. denied 434 U.S. 1072, 98 S.Ct. 1258, 55 L.Ed.2d 776 (1978) (Terry stop of tractor-trailer on small country road justified on basis of officer's knowledge that it was highly unusual for commercial vehicle to travel on such a road late at night); Commonwealth v. Lawrence, 311 Pa.Super. 326, 457 A.2d 909 (1983) (Terry stop justified where officer familiar with area knew that the driver pulling out of

driveway late at night did not live in residence nor own car he was driving. Se also, Commonwealth v. Higgins, 346 Pa.Super. 238, 499 A.2d 585 (1985), U.S. Cert. denied in 107 S.Ct. 149.

In the case on hand the stop of appellant was premised solely on an informant's unverified allegation that appellant was carrying drugs. Granted, in the past the informant did provide police with reliable information about local drug operations. However, instantly the informant supplied police with no independent facts or additional reasons to corroborate his contention appellant possessed P.C.P.

Indeed, the actions of appellant were perfectly innocent. He arrived at his residence without any proof of criminal wrongdoing present. It was not until appellant was ordered out of his vehicle that the presence of contraband was discovered. However, up to that point in

time there was no evidence of drug possession, or even traffic violations, to justify the stop.

The additional information provided by the informant concerning the color and model of appellant's car, and the estimated time of appellant's arrival at Saude Avenue, does not support the criminal nature of the informant's tip. The fact the Tinicum Township police confirmed that appellant lived on Saude Avenue and that a black Dodge automobile was frequently parked in front of the property, was information arguably available to anyone who knew appellant. Moreover, Detective Greenwalt's knowledge that appellant was previously involved in drug activities in 1981 and 1985 does not justify a conclusion that appellant was again involved in drug operations in 1987. In other words, the nature of the additional facts told to Detective Greenwalt by the informant does not create or support a valid premise for reasonable suspicion of criminal

activity by appellant. Thus, even if the factual circumstances in the case at bar were in accordance with a Terry stop, the police could not point to any articulated facts to premise the investigative stop of appellant's automobile other than the informant's unsupported allegation that appellant was carrying P.C.P.

In conclusion, we hold that police may not conduct a valid investigative stop based solely on a confidential informant's isolated and uncorroborated allegation that a particular individual is in possession of drugs. We do not imply that confidential information may not buttress a police officer's foundation for an investigative stop in situations where the officer can point to specific and articulated facts. However, in the absence of exigent circumstances, admittedly not present here, unsupported allegations by informants that certain individuals possess drugs which do not rise to the level of probable cause for

a search warrant, may not be utilized by the police five (5) hours later to justify an investigative stop on a person's private property.

Judgment reversed. Jurisdiction relinquished. TAMILIA, J. files a Dissenting Opinion.

J. 87006/1988

COMMONWEALTH OF PENNSYLVANIA	:	IN THE
	:	SUPERIOR
Appellee	:	COURT OF PA
	:	
V.	:	
	:	No. 1859
CARL FRANZ OGBORNE,	:	Phila. 1988
	:	
Appellant	:	

Appeal from the Judgment of Sentence of the Court of Common Pleas of Delaware County, Criminal at No. 283-87

BEFORE: CAVANAUGH, TAMILIA AND POPOVICH, JJ

DISSENTING OPINION BY TAMILIA, J.:

FILED MAY - 1 1989

I respectfully dissent. While much of what the majority concludes is correct, it errs when it refuses to acknowledge that information which might not support probable cause for a search warrant, when enhanced by surveillance and verification, will support a later arrest. This procedure is not at all uncommon and the majority's holding, if universally applied, will hamstring police in effectively dealing with the highly mobile and pervasive traffic in drugs.

Once the police verified the activity,

information of which was supplied by the informant, they were permitted to make a Terry[4] type stop based on suspicion alone. Following the stop, upon detecting the odor of P.C.P. in the car, they were permitted to go further and pat down the persons for safety reasons. When the pat down disclosed packets, these were not to be ignored and their emission of the odor of P.C.P. entitled the police to proceed further with a more extensive search and arrest.

I would affirm the trial court and deny appellant's request for a new trial.

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[4]Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed 889 (1968)

IN THE COURT OF COMMON PLEAS OF DELA.CO.,PA.

COMMONWEALTH OF PENNA. : NO. 283-87

VS. :

CARL FRANZ OGBORNE :

Douglas Roger, Esq.,Asst. District Atty, for the Commonwealth, Court House,Media,PA 19063
F.Kirk Adams,Esq.,Atty. for Def.,Eight West Front Street, Media, PA 19063

O P I N I O N

TOAL,J. DATE: MARCH 28, 1988

The defendant was found guilty of possession of a controlled substance, possession with the intent to deliver a controlled substance, and possession of drug paraphernalia. The defendant has filed a timely motion for a new trial and oral argument has been held.

Eighty-nine small packets containing phencyclidine (hereinafter referred to as "PCP"), a controlled substance, were seized by the police from the person of the defendant, and the remains of a cigarette with PCP and cigarette rolling paper were removed from the automobile the defendant

was driving when the police came upon him, stopped in his automobile, in the driveway of his home. The defendant contends that his Fourth Amendment rights were violated and that the evidence, therefore, should have been suppressed and not permitted to be used at the trial. He specifically alleges that the police did not have justification to make an investigatory stop and, further, that in any event, the police conduct exceeded a lawful investigatory stop. He further claims that he was under arrest prior to the police detecting the odor of PCP and, consequently, prior to the police having probable cause to arrest. We disagree.

At the suppression hearing, Detective Greenwalt of the Delaware County C.I.D., testified for the Commonwealth that during the early evening hours of January 15, 1987, he received a telephone tip from a confidential informant whose credibility was proven to him to be reliable from past

experience. The informant had given information to him that had resulted in the arrest and conviction of drug violators within the County of Delaware within the last year. The informant told Detective Greenwalt that the defendant would be returning from Philadelphia within the next couple of hours, operating a brand new black Dodge Daytona automobile. He would have in his possession approximately ten (10) bundles of PCP or Angel Dust. He would be driving to the area of the 100 block of Saude Avenue, Essington, Tinicum Township, Delaware County, to a house situated towards the rear of a lot in the middle of the block, with a long driveway leading to it. Detective Greenwalt knew the defendant and knew that the defendant had been involved in the distribution of PCP in 1981 and again in January, 1985. He knew the defendant and had spoken to him on numerous occasions in the past. Detective Greenwalt then contacted the Tinicum Township Police

Department and confirmed that the defendant and his wife resided at 115 Saude Avenue, Tinicum Township, and that a black Dodge Daytona was frequently parked in front of that address.

Detective Greenwalt and several other police officers set up a surveillance of the 100 block of Saude Venue and, at approximately 11:20 P.M., they observed a new black Dodge Daytona automobile proceeding south on Saude Avenue and turning into the driveway at 115 Saude Avenue. Detective Greenwalt recognized the defendant as the driver of the automobile and pulled his vehicle into the driveway, parking directly behind the Dodge. Other police cars pulled into the driveway behind Detective Greenwalt's car. Detective Greenwalt then activated his revolving red light on the dashboard so that the defendant would realize that the cars in the driveway behind him were police cars.

The defendant stayed in his car with

the engine running and the windows up while Detective Greenwalt approached the driver's side of the car and tapped on the window. He showed the defendant his police badge and identified himself and asked him to shut off his car several times. Getting no response from the defendant, Greenwalt then opened the car door a couple of inches and said, "Carl, this is a police officer, turn the car off." When he opened the door of the car the detective smelled the odor of PCP and then asked the defendant to step out of the car.

Before Detective Greenwalt opened the door of the Dodge, three other officers surrounded the car, one in front, one to the passenger side and one to the rear. The officer in front of the Dodge was in uniform and the defendant's headlights were shining on him clearly.

After Detective Greenwalt smelled the odor of PCP and had the defendant step out of the car, he searched the defendant and

found suspected PCP on his person and searched the car and found suspected PCP in the ashtray of the car.

> In striking the balance between the constitutionally protected interests of the private citizen to be free from unreasonable searches and seizures and the government's interest which sometimes justifies official intrusion upon those interests, See Terry v. Ohio, supra. at 20-27, 88 S.Ct. at 1879-83, courts have identified three levels of governmental intrusion which require increasing degrees of justification to withstand constitutional scrutiny. (citations omitted) The least offensive of these intrusions occurs when a police officer approaches a citizen and directs a question to him when there is some objectively credible reason not necessarily indicating criminality. (Footnote with citations omitted) A more severe form of governmental intrusion occurs when a police officer detains an individual by means of physical force or a show of authority for the purpose of investigation upon a suspicion that he may be connected with criminal activity. (footnote with citations omitted) Of course, "in justifying [such an] intrusion, the police officer must be able to point to specific and articulable facts which taken together with rational inferences from those facts reasonably warrant that

> intrusion." Terry v. Ohio, supra, 392 U.S. at 21, 88 S.Ct. at 1880 (footnote with citations omitted) (emphasis added) The most severe form of governmental intrusion is the warrantless arrest which requires that the police officer possess probable cause to believe that a crime had been committed and that the person to be arrested is the culprit. (footnote with citations omitted)

Comm. v. Williams, 287 Pa.Super. 19, 429 A.2d 698, 700 (1981).

The Commonwealth contends that the police conduct in this case was part of a lawful investigatory stop and the defendant's Fourth Amendment rights were not violated.[1] Although in this case the defendant had actually stopped his automobile in his driveway with the engine on, we find that the usual legal analysis

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[1] The Commonwealth, at the suppression hearing, conceded that Detective Greenwalt did not have probable cause prior to stopping the defendant. We find this to be a close question. Clearly, had the confidential informant indicated to Detective Greenwalt a factual basis for how he/she obtained the information concerning the defendant, in our opinion, probable cause would have been shown.

for testing the lawfulness of an investigatory stop applicable. "This test is that in evaluating an investigative stop, a court must first inquire whether 'the officer's action was justified at its inception,' that is, whether it was based upon 'specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion...'"Comm. v. Higgins, 346 Pa.Super. 238, 499 A.2d 585, 590, quoting Terry v. Ohio, 392 U.S. 1 at 20, 88 S.Ct. 1868 at 1879.

Here, Detective Greenwalt had sufficient facts to suspect that the defendant might be connected with criminal activity clearly justifying temporary detention of the defendant for purposes of further investigation. Detective Greenwalt had information from a reliable informant, whose credibility had been tested, that the defendant was presently engaged in criminal activity. Greenwalt knew that the defendant

had engaged in the sale of PCP in the past. Information obtained from the informant was verified in part by police surveillance.

Next, we must inquire as to "whether [the intrusion] was reasonably related in scope to the circumstances which justified the interference in the first place..." Comm. v. Higgins, supra, at 590, quoting Terry v. Ohio, 392 U.S. 1 at 20, 88 S.Ct. 1868 at 1879. As previously discussed, the police had a legitimate basis to strongly suspect that the defendant had PCP on his person or in his automobile. Therefore, blocking his escape routes surely was reasonable under the circumstances. The fact that the procedure was calculated to temporarily detain the defendant is not a violation of his Fourth Amendment rights. The very purpose of an investigative stop is to detain the individual temporarily for investigative purposes. Comm. v. Higgins, supra; Comm. v. Douglass, (Pa.Super.,1541 Pittsburgh 1986, filed March 14, 1988).

Here, the time of the detention was minimal before the police had probable cause to arrest the defendant. When the defendant failed to respond to Detective Greenwalt's attempts to get his attention from outside the car we find the further intrusion of opening the car door a few inches to speak to the defendant reasonable conduct on the part of Detective Greenwalt and justified under the circumstances.

With the information that he already had, once Greenwalt smelled the odor of PCP coming from inside the automobile he clearly had probable cause to search the defendant, to search the automobile, and to arrest the defendant. U.S. v. Ross, 456 U.S. 799, 102 S.Ct. 2157 (1982); Comm. v. Melyak, 508 Pa. 2, 493 A.2d 1346 (1985).

Finally, the defendant contends that by their actions the police effectuated an arrest of him prior to detective Greenwalt discovering the odor of PCP and, therefore, prior to having probable cause to make the

arrest, citing as authority Comm. v. Duncan, 514 Pa. 395, 525 A.2d 1177 (1987); Comm. v. Lovette, 498 Pa. 665, 450 A.2d 975 (1982). In those cases it is clear that the defendant was in custody and subject to the actual control and will of the police prior to the police having probable cause to arrest. Here, the defendant was not taken into custody but, as previously discussed, initially briefly detained for investigative purposes. Comm. v. Douglass, supra.

For the foregoing reasons, we find that the Trial Judge did not err in denying the defendant's motion to suppress and in admitting at the trial evidence obtained in the search of the defendant and his automobile. Therefore, we deny the defendant's motion for a new trial.

BY THE COURT:

William R. Toal, Jr.,Judge

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

Comm.of Penna. : No. 28 E.D.Appeal
Appellant Docket 1990

vs. :

Carl Franz Ogborne :

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the appeal having been improvidently granted, the same is hereby dismissed.

Marlene F. Lachman, Esq.
Deputy Prothonotary

DATED: January 7, 1991

Appendix C

[J-213 of 1990]
IN THE SUPREME COURT OF PENNA.
Eastern District

COMM. OF PENNA.	:	No. 28 E.D.Appeal Dkt.1990
	:	Appeal from Order of Superior Ct. entered May 1, 1989, at No. 1859 Phila. 1988,
v.	:	Reversing Judgment of Sentence of Court of Common Pleas of Dela. County, Criminal Div. entered May 13, 1988,at No. 283-87
	:	
CARL FRANZ OGBORNE	:	__Pa.Super.__,__ A.2d__ (1989)
	:	Argued:Dec. 3, 1990

O R D E R

PER CURIAM: FILED: JANUARY 7, 1991

Appeal dismissed as having been improvidently granted.

Mr. Justice McDermott did not participate in the consideration or decision of this case.

Mr. Justice Larsen dissents.

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMM. OF PENNA. : NO. 282-87

VS. : ATTY. I.D.#03733

CARL FRANZ OGBORNE :

PETITION TO SUPPRESS EVIDENCE

TO THE HONORABLE, THE JUDGES OF SAID COURT:

The Petition of the Defendant, Carl Franz Ogborne, by his attorney, F. Kirk Adams, Esquire, respectfully represents:

1. On or about January 15, 1987, the Defendant, was arrested by officers of the Delaware County CID outside of 115 Saude Avenue, Tinicum Township, Pennsylvania.

2. At the time of his arrest, Defendant was lawfully driving a Dodge automobile and had just pulled into the driveway at 115 Saude Avenue.

3. The Defendant was searched incident to his arrest.

4. The search of Defendant's person revealed 80 packets of suspected PCP, a controlled substance which had been

concealed under Defendant's shirt and jacket.

5. The CID officers who arrested and searched the Defendant did not have an arrest warrant or search warrant for the Defendant or the Dodge motor vehicle he was driving.

6. The CID officers who arrested and searched the Defendant did not have probable cause to believe the Defendant was in possession of a controlled substance or that a controlled substance might be found in the Dodge automobile.

7. Furthermore, the CID officers who arrested and searched the Defendant did not have probable cause to believe that the Defendant had committed a criminal offense.

8. The Defendant, is informed believes and therefore avers that his arrest and search incident to that arrest were unlawful and in violation of the Defendant's rights protected by the Constitution of Pennsylvania and the Constitution of the

United States.

WHEREFORE, the Defendant prays that this Honorable Court will enter a Rule on the Commonwealth of Pennsylvania to show cause why the evidence seized from the Defendant and the Dodge automobile should not be suppressed.

RESPECTFULLY SUBMITTED,

F. KIRK ADAMS, ESQUIRE
ATTORNEY FOR DEFENDANT
EIGHT WEST FRONT STREET
MEDIA, PENNSYLVANIA 19063
(215) 565-4490
ATTORNEY I.D. #03733

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMM. OF PENNA. : NO.283-87

VS. : ATTORNEY I.D. #03733

CARL FRANZ OGBORNE :

MOTION FOR NEW TRIAL

The Defendant, Carl F. Ogborne, by his attorney, F. Kirk Adams, Esquire, respectfully moves the Court for a new trial on the following grounds:

1. The learned trial Judge erred when he denied the Defendant's motion to suppress the evidence found on the Defendant and in the Defendant's car at the time of his arrest.

2. The Defendant requests leave to file a written Brief within thirty (30) days of the filing of the transcript of the testimony from the Suppression hearing in this case.

RESPECTFULLY SUBMITTED:

F.KIRK ADAMS, ESQUIRE

ATTY. FOR DEF.
8 WEST FRONT ST.
MEDIA, PA 19063
(215) 565-4490
ATTY. I.D.#03733

Appendix E